

THE HONORABLE KAREN L. STROMBOM

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

KEN ARONSON,

Plaintiff,

v.

DOG EAT DOG FILMS, INC.,

Defendant.

NO. 3:10-CV-05293-KLS

PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION FOR  
ATTORNEYS' FEES AND COSTS  
UNDER RCW 4.24.525

NOTE FOR MOTION CALENDAR:

OCTOBER 8, 2010

**I. RELIEF REQUESTED**

Plaintiff respectfully requests the Court deny the defendant's motion because (1) it seeks to profit from misrepresentations the defendant made to Plaintiff and the Court; (2) it seeks to impose retroactive penalties for a complaint that was filed before the Anti-SLAPP legislation became effective; and, (3) it relies on insufficient evidence and requests an unreasonable amount for fees and costs (more than many Tacoma lawyers make in a single year) for a single motion. In the alternative, the Court should stay any penalties under the statute until Plaintiff's pending appeal is resolved.

PLTFFS' OPP TO DEF'S MOT FOR FEES - 1 of 14  
NO. 3:10-CV-05293-KLS

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## II. BACKGROUND FACTS

The defendant became aware of this case on September 25, 2009, when its talent agent was served with a copy of the complaint and a letter suggesting an early mediation.<sup>1</sup>

The complaint was filed on April 27, 2010,<sup>2</sup> and served on April 29, 2010.<sup>3</sup> Although the defendant's answer was due within twenty days, its lead counsel requested an extension under the guise that "I will be getting married next week, and then going on a honeymoon to New Zealand, and will return to my office on June 7, 2010. Accordingly, I would appreciate an extension regarding the deadline or deadlines to file the Answer to Complaint and any Motion in response to the Complaint to June 9, 2010."<sup>4</sup> Plaintiff stipulated to an extension based on that representation,<sup>5</sup> and the Court granted the stipulated continuance.<sup>6</sup>

As it turns out, the representation was false, or was a calculated misrepresentation aimed at abusing the legislative and judicial process: as the defendant knew by drafting it, the Washington Anti-SLAPP Act ("the Act") was not effective until June 10, 2010.<sup>7</sup>

The defendant used its continuance to file its answer the day before its handcrafted legislation became effective, disclosing its Anti-SLAPP defense for the first time,<sup>8</sup> and filed

<sup>1</sup> Declaration of Service, Vertetis Decl., Ex. 1.

<sup>2</sup> *See generally* Complaint, Dkt. #1 (filed on April 27, 2010).

<sup>3</sup> Declaration of Service, Vertetis Decl., Ex. 2.

<sup>4</sup> Letter from Johnson to Vertetis, dated May 18, 2010, Vertetis Decl., Ex. 3.

<sup>5</sup> Vertetis Decl., at ¶ 4.

<sup>6</sup> Stipulation and Order to Extend Defendant's Deadline to Answer the Complaint and/or Make Any Motion in Response to the Complaint, Dkt. # 12 (filed on May 25, 2010).

<sup>7</sup> Final Bill Report, SSB 6395, Vertetis Decl., Ex. 4.

<sup>8</sup> Answer and Affirmative and Other Defenses, Dkt. # 13 (filed June 9, 2010), at ¶ 6.11.

1 its motion to strike the day after its legislation became effective.<sup>9</sup> Its newly disclosed time  
 2 entries reflect this was not coincidental timing: instead, the defendant was furiously working  
 3 to apply its legislation to this case when it represented that it needed a continuance because its  
 4 lead counsel would be out of the country.<sup>10</sup> This includes numerous entries prior to May 18,  
 5 2010, where the defendant strategized on how to apply its legislation,<sup>11</sup> and numerous entries  
 6 between that date and June 7, 2010, where its lead counsel, who was supposedly out-of-the-  
 7 country and unable to work on this case, continued working on its special motion to strike.<sup>12</sup>

8  
 9 When it was filed, the motion contained ten pages of legal analysis. Of those ten  
 10 pages, four analyzed the Act<sup>13</sup> and six analyzed Plaintiff's underlying claims.<sup>14</sup> Other than  
 11 asserting a higher burden of proof because of the Act, those six pages contain no reference to  
 12 the Act. In other words, sixty-percent of the motion was devoted to issues that it would have  
 13 had to research and brief regardless of any motion to strike. Moreover, out of eleven pages of  
 14 legal analysis in its reply, two (18%) were devoted to the Act<sup>15</sup> and nine (82%) were devoted  
 15 to the unrelated, underlying claims.<sup>16</sup>

16  
 17 Adding the above numbers, only 28.6% of the motion analyzed the Act, while 71.4%  
 18 analyzed the unrelated, underlying claims. Despite the fact that 71.4% was devoted to  
 19

20  
 21 <sup>9</sup> See generally Defendant's Special Motion to Strike Plaintiff's Claims of Misappropriation of Likeness and  
 Invasion of Privacy, Dkt. #15 (filed on June 11, 2010).

22 <sup>10</sup> Declaration of Bruce E.H. Johnson in Support of Defendant's Motion for Attorneys' Fees and Costs Under  
 RCW 4.24.525, Dkt. #31 (filed on September 22, 2010), Exhibit E, at 39-52.

23 <sup>11</sup> *Id.* at 39-43.

24 <sup>12</sup> *Id.* at 43-52.

25 <sup>13</sup> Defendant's Special Motion to Strike Plaintiff's Claims of Misappropriation of Likeness and Invasion of  
 Privacy, Dkt. #15 (filed on June 11, 2010), at 4-6, 13.

26 <sup>14</sup> *Id.* at 7-12.

<sup>15</sup> Defendant's Reply in Support of Special Motion to Strike, Dkt. # 21 (filed July 9, 2010), at 1-2.

argument unrelated to the Act, the defendant makes no effort to distinguish how much of the \$47,000 it seeks to recover was spent on the 28.6% related to the Act.<sup>17</sup>

While the evidence the defendant has submitted makes it impossible for Plaintiff or the Court to decipher how much of the 152.4 hours was actually spent researching and writing regarding the Act, a handful of entries reflect why it cannot genuinely request \$47,000 in fees:

- (1) \$272 for a “[t]elephone conference with Mr. Weinrib and Mr. Keating regarding case background and proposed defense strategy (.5);”<sup>18</sup>
- (2) \$374 to “Review film ‘Sicko’ to identify material REDACTED,” *Id.* at 40;
- (3) \$408 to “REDACTED research defenses to misappropriation claims (.2),” to “[r]eview motion to dismiss strategy issues (.5),” and to “REDACTED strategize and evaluate options for motion to dismiss (.5),” *Id.* at 41;
- (4) \$816 to “meet with Ms. Lim to get information and materials about Aronson v. Turnbow, including copies of the VHS tapes of the original master tapes of the home video at issue and travel time to Ms. Lim’s Tacoma office; ... direct paralegal in copying VHS tapes to DVD (.2),” *Id.* at 41;
- (5) \$315 to “[r]esearch vendors and obtain estimates for video transfer (1.2); deliver videos to ProLumina for transfer to DVD (.6),” *Id.* at 42;
- (6) \$306 to “research and strategize support for defenses and motions, including fair use and Washington Anti-SLAPP motion to strike (.6)” and to “analyze potential motion to dismiss cases (.3),” *Id.* at 43;
- (7) \$155.50 to “[r]eview possible motion to dismiss arguments, etc.” and to “[r]eview video for clip breakdown (.5),” *Id.* at 44;
- (8) \$1,924.50 to “[w]ork on motion to dismiss strategy issues, etc.,” to “[r]esearch, analyze, and strategize early options to dismiss case,” to

<sup>16</sup> *Id.* at 3-11.

<sup>17</sup> See generally Declaration of Bruce E.H. Johnson in Support of Defendant’s Motion for Attorneys’ Fees and Costs Under RCW 4.24.525, Dkt. #31 (filed on September 22, 2010), including Exhibit E.

<sup>18</sup> Declaration of Bruce E.H. Johnson in Support of Defendant’s Motion for Attorneys’ Fees and Costs Under RCW 4.24.525, Dkt. #31 (filed on September 22, 2010), Exhibit E, at 40.

“[c]omplete identification and location of video clips used in film (.7),” to “[w]ork on dismissal analysis,” to “[r]eview length of individual clips used in ‘Sicko’ from the underlying work (.2),” and to “[a]nalyze and research claims, and draft memorandum regarding best options for summary adjudication of claims,” *Id.* at 45;

- (9) \$1,428 to “[r]eview possible motion to dismiss cases (.6); additional legal research regarding same (.3),” to “[r]esearch public interest defense, and documentary films as First Amendment protected speech (1.0); analyze and draft memorandum with options for summary adjudication (0.5),” and to [r]eview analysis regarding motion to dismiss strategy, etc. (.6); review cases regarding same (.2); analyze and draft dismissal arguments (.7); review preemption cases (.3),” *Id.* at 46;
- (10) \$3,366 to “[r]esearch and draft Special Motion to Strike state law claims of misappropriation of likeness and invasion of privacy under Anti-SLAPP Act (6.7); REDACTED research whether the Copyright Act preempts plaintiff’s state law claims for Motion to Strike under Anti-SLAPP Act (1.0),” *Id.* at 47-48;
- (11) \$1,768 to “REDACTED research Washington statute of limitations for invasion of privacy (other than false light) and misappropriation of likeness for Anti-SLAPP Motion to Strike (1.2); draft notice of filing physical materials to accompany Motion to Strike (0.2),” *Id.* at 49;
- (12) \$1,190 to “research case law support for argument in Anti-SLAPP motion that a documentary film qualifies as ‘speech’ (1.5); research, analyze, and draft argument for Anti-SLAPP motion that plaintiffs’ state law claims are preempted by section 301 (2.0),” *Id.* at 50;
- (13) \$2,380 to “[r]esearch and draft Reply in Support of Special Motion to Strike (6.6),” *Id.* at 58;
- (14) \$578 to “review additional Anti-SLAPP cases, commercial speech and First Amendment decisions, and analyze same (1.7),” *Id.*;
- (15) \$4,386 to “[r]esearch and draft Reply in Support of Special Motion to Strike,” *Id.* at 59;
- (16) Another \$3,536 to “[r]esearch, draft and finalize Reply in Support of Special Motion to Strike,” *Id.*

Even with the scant information the defendant has provided, it is apparent the \$23,203 in fees listed above are unrelated to any factual or legal research the defendant was separately required to do in order to file its motion to strike. Additionally, the defendant's own evidence reflects its request for \$46,965 in fees and costs is excessive by \$1,521. Under its rates, the maximum it can request is \$24,088.50 for the work of Kvasnosky (90.9 x \$265/hour); \$16,210.50 for the work of Johnson (32.1 x \$505/hour); and, \$5,145 for the work of Chermoshnyuk (29.4 x \$175/hour).<sup>19</sup> Under its own billing standards, the maximum the defendant can request is \$45,444. This is in stark contrast to the twenty hours and \$6,000 in fees Plaintiff incurred in responding to the motion.<sup>20</sup>

### III. EVIDENCE RELIED UPON

This opposition brief relies upon the Declaration of Thomas B. Vertetis in Support of Plaintiff's Opposition to Defendant's Motion for Attorneys' Fees and Costs Under RCW 4.24.525 ("Vertetis Decl."), as well as the pleadings, exhibits, and documents previously filed in this case.

### IV. LEGAL ARGUMENT

The Court should deny the defendant's motion because (1) it seeks to profit from its misrepresentations; (2) it seeks to impose retroactive penalties for a complaint that was filed before the Act became effective; and, (3) it relies on insufficient evidence and requests an unreasonable amount for fees and costs for a single motion. In the alternative, the Court should stay any penalties under the statute until Plaintiff's pending appeal is resolved.

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<sup>19</sup> Declaration of Bruce E.H. Johnson in Support of Defendant's Motion for Attorneys' Fees and Costs Under RCW 4.24.525, Dkt. #31 (filed on September 22, 2010), at ¶¶ 3-5 (reflecting the hourly rates and hours billed); Declaration of L. Keith Gorder, Jr., in Support of Defendant's Motion for Attorneys' Fees and Costs, Dkt. #32 (filed on September 22, 2010), at ¶¶ 3-4 (reflecting the hourly rates and hours billed).

<sup>20</sup> Vertetis Decl., at ¶ 6.

1           **First**, the Court should refuse to allow the defendant to profit from the  
 2 misrepresentation it made to Plaintiff and the Court in order to ensure its answer and motion  
 3 were filed after the effective date of the Act. The Court should not endorse a judicial system  
 4 where a party can handcraft overly broad, “sleeper” legislation targeted at the opposing party,  
 5 use a misrepresentation to obtain a continuance until its legislation becomes effective, and  
 6 then ask the Court to award \$57,000 in penalties based on its legislation. *Interstate Fire &*  
 7 *Casualty Co., v. Underwriters of Lloyd’s, London*, 139 F.3d 1234, 1239 (9th Cir. 1998) (a  
 8 trial court has discretion to apply judicial estoppel to protect the integrity of the judicial  
 9 process); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (a trial court has inherent power  
 10 to manage its proceedings and control the conduct of parties, including the inherent authority  
 11 to sanction bad faith conduct that threatens the integrity of the judicial process).

12           The defendant already obtained substantial relief through the Act, including the  
 13 dismissal of certain claims under a higher burden of proof. The Court should protect the  
 14 integrity of the judicial process by refusing to further reward the defendant for its  
 15 misrepresentation and its abuse of the legislative and judicial process.

16           Moreover, Plaintiff asked the Court to reconsider its decision to apply the Act because  
 17 the Washington constitution protects its citizens from “sleeper” legislation that violates  
 18 Article II, Section 37, and overly broad legislation that violates Article II, Section 19.<sup>21</sup> The  
 19 Court refused because it concluded Plaintiff failed to raise these issues in response to the  
 20 defendant’s motion and pointed to no new evidence that would justify reconsideration.<sup>22</sup>

21 Plaintiff’s Motion for Reconsideration, Dkt. #24 (filed September 9, 2010), at 4-6.

22 Order Denying Plaintiff’s Motion for Reconsideration, Dkt. # 33 (filed September 28, 2010).

1 The defendant's time entries, which Plaintiff could not have obtained until it  
 2 voluntarily disclosed them, provide that new evidence and justify the Court (1) reconsidering  
 3 its decision and (2) refusing to impose any penalties. Respectfully, they highlight why  
 4 application of the Act was manifest error and resulted in an injustice that justifies relief. Fed.  
 5 R. Civ. P. 60(b)(2), (6). The defendant plainly used its overly broad, sleeper legislation to  
 6 attack this case, and now wants extra credit for doing so. The Court should revisit its decision  
 7 to deny Plaintiff's motion for reconsideration. The civil rules are to be construed to promote  
 8 justice, not to endorse a party's abuse of the legislative and judicial process. Fed. R. Civ. P. 1.  
 9

10 **Second**, the Court should deny the defendant's motion because it seeks to  
 11 retroactively impose penalties using a statute that was not effective until after this case was  
 12 filed. *Johnston v. Beneficial Management Corp. of America*, 85 Wn.2d 637, 642-43, 583 P.2d  
 13 510 (1975) (a statute that creates a new liability or imposes a penalty will not be construed to  
 14 apply retroactively); *Chenault v. U.S. Postal Service*, 37 F.3d 535, 537-38 (1994) (a court  
 15 must examine each provision of a statute to determine whether it can be applied retroactively,  
 16 which it should not absent clear legislative intent); *Martin v. Hadix*, 527 U.S. 343, 352-55,  
 17 357-62 (1999) (statute regarding fees and costs should not impose "new legal consequences to  
 18 events completed before its enactment" and "upset the reasonable expectations of the  
 19 parties"). The defendant can point to no "unambiguous directive" or similar language in the  
 20 Act that suggests the legislature intended to impose a \$10,000 penalty and \$47,000 in fees and  
 21 costs for a complaint filed before its effective date.  
 22

23 **Third**, and at most, the Court should substantially reduce the defendant's fees and  
 24 costs because 152.4 hours and \$46,964 for a single motion is excessive and unreasonable,  
 25  
 26



1 particularly where 71.4% of that motion had nothing to do with the Act. *Loeffelholz v.*  
 2 *Citizens for Leaders with Ethics & Accountability Now*, 119 Wn. App. 665, 711, 82 P.3d 1119  
 3 (2004) (a fee award must be segregated between recoverable fees and non-recoverable fees).  
 4

5 This is not a case where the issues are “so related that no reasonable segregation of  
 6 successful and unsuccessful claims can be made.” *Hume v. Am. Disposal Co.*, 124 Wn.2d  
 7 656, 673, 880 P.2d 988 (1994). To the contrary, at least \$23,203 of the fees requested by the  
 8 defendant is for work unrelated to the Act or for overlapping work (such as the request for  
 9 more than \$7,000 to write, and then apparently re-write, its reply brief).  
 10

11 Similarly, this is not a case, for example, where claims arise out of a contract or statute  
 12 that provides for fees and costs so the party is entitled to them. *Cf. e.g. Deep Water Brewing,*  
 13 *LLC, v. Fairway Resources Ltd.*, 152 Wn. App. 229, 278, 215 P.3d 990 (2009). Absent the  
 14 Act, the defendant would not have been entitled to any fees and costs if it had defeated  
 15 Plaintiff’s claims through a motion to dismiss, on summary judgment, or by verdict. For that  
 16 reason, it is not entitled to fees and costs for work unrelated to the Act. *Dayton v. Farmers*  
 17 *Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994) (a court may only award fees and costs  
 18 for that portion of the lawsuit for which fees are authorized).  
 19

20 Given that only 28.6% of the defendant’s work was related to the Act, a more  
 21 appropriate method of calculating fees is to award the defendant 28.6% of the fees it actually  
 22 earned under its own standard billings rates:

23 \$24,088.50 for the work of Kvasnosky (90.9 x \$265/hour) x 28.6% = \$6,889.31

24 \$16,210.50 for the work of Johnson (32.1 x \$505/hour) x 28.6% = \$4,636.20

25 \$5,145 for the work of Chermoshnyuk (29.4 x \$175/hour) x 28.6% = \$1,471.47  
 26

1 TOTAL: \$12,996.98.

2 Additionally, because Johnson represented he was unavailable to work during the time  
3 he now claims he worked almost every day, the Court should reduce that total by another  
4 \$991.85 (\$3,468 of claimed work x 28.6%) to \$12,005.13.  
5

6 However, because the defendant failed to segregate and failed to provide sufficient  
7 information for Plaintiff or the Court to decipher how much of the remaining fees are  
8 recoverable, the Court should error on the side of reducing the fee request in order to avoid  
9 over-compensating the defendant. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581,  
10 587-98, 675 P.2d 193 (1983) (an attorney must provide "reasonable documentation" that  
11 informs the court of the hours worked and the type of work performed); *Scott Fetzer v.*  
12 *Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993) (the party requesting fees and costs bears  
13 the burden of proving the reasonableness of the fees); *Kastanis v. Educ. Employees Credit*  
14 *Union*, 122 Wn.2d 483, 514-15, 859 P.2d 26 (1993) (trial court erred by failing to segregate).  
15

16 The Court should reduce the defendant's request to \$10,000. Even using the "blended  
17 rate" of \$340/hour, \$10,000 compensates the defendant for almost 30 hours of work. This  
18 number is particularly appropriate where the defendant "assisted in drafting Washington's  
19 Anti-SLAPP Act," and where Plaintiff only incurred twenty hours of work and \$6,000 in fees  
20 in responding to the defendant's motion. The defendant can pay its counsel \$275/hour,  
21 \$340/hour, or \$505/hour because of their pedigree in these matters, but they cannot genuinely  
22 claim it is reasonable for that same counsel to spend 152.4 hours on a single motion.  
23

24 **Finally**, given that Plaintiff has filed an appeal regarding the Court's order granting  
25 the defendant's motion to strike and the Court's order denying Plaintiff's motion for  
26

1 reconsideration,<sup>23</sup> Plaintiff respectfully requests the Court stay any penalties until the appeal  
2 is resolved. Fed. R. Civ. P. 62(c). A stay is appropriate because (1) Plaintiff has  
3 demonstrated a strong showing that he will succeed on appeal where the Act was not intended  
4 to apply to the claims at issue and is unconstitutional; (2) Plaintiff, a single man, faces severe  
5 prejudice and harm in the form of financial ruin if he is ordered to pay a \$10,000+ penalty  
6 before his appeal is resolved, (3) a stay will not substantially injure the defendant where the  
7 \$10,000 penalty is punitive and not compensatory, and where the majority of the \$47,000 in  
8 fees was unrelated to the Act, and (4) the public interest lies in allowing Plaintiff to pursue his  
9 appeal so these constitutional matters may be resolved. *Hilton v. Braunskill*, 481 U.S. 770,  
10 776-77 (1987).  
11

12  
13 While Plaintiff understands the Court rejected his motion for reconsideration, the  
14 Court did so because it concluded Plaintiff failed to raise constitutional issues in response to  
15 the defendant's motion and no new evidence justified reconsideration. But respectfully, a  
16 party may raise jurisdictional issues at any time, and the Ninth Circuit will consider  
17 constitutional issues when an "injustice might otherwise result" or when public policy  
18 requires review. *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1206  
19 (1974); *see also Levinson v. Washington Horse Racing Com'n*, 48 Wn. App. 822, 828, 740  
20 P.2d 898 (1987) (a party may raise a constitutional issue as late as a motion for  
21 reconsideration from a Court of Appeals decision); RAP 2.5(a)(3) (a party may raise a  
22 "manifest error affecting a constitutional right" for the first time on appeal).  
23  
24

25  
26 <sup>23</sup> Amended Notice of Appeal, Dkt. #34 (filed on September 30, 2010).

## V. CONCLUSION

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CERTIFICATE OF SERVICE

I, Terry Asbert, hereby certify that on today's date, I caused to be filed electronically (1) Plaintiff's Opposition to Defendant's Motion for Attorneys' Fees and Costs Under RCW 4.24.525, and (2) the Declaration of Thomas B. Vertetis in Support of Plaintiff's Opposition to Defendant's Motion for Attorneys' Fees and Costs Under RCW 4.24.525, with the court, using the CM/ECF system, which will send email notification of such filing to the below addresses, and I served a true and correct copy of the following documents by the method indicated below and addressed as follows:

PLTFFS' OPP TO DEF'S MOT FOR FEES - 13 of 14  
NO. 3:10-CV-05293-KLS

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